Supreme Court of the United States

OCTOBER TERM, 1953

No. 407

ROBERT NORBERT GALVAN,

Petitioner,

v.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 27-34) is reported at 201 F. 2d 302. The District Court entered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1953 (R. 35), and a petition for rehearing was denied on March 9, 1953 (R. 36). The petition for certiorari, filed on May 25, 1953, was granted on October 12, 1953. This Court has jurisdiction over the cause pursuant to 28 U. S. C. 1254(1).

Statute Involved

Prior to 1940 the Act of October 16, 1918 (40 Stat. 1012, 8 U. S. C. 137), provided inter alia for the deportation of aliens who were currently members of organizations advocating the overthrow of the Government by force and violence. By amendment in 1940 (54 Stat. 673), membership in such an organization at any time in the past, after entry, was made an additional cause for deportation. The 1950 amendment (Section 22 of the Internal Security Act of 1950, 64 Stat. 1006) added to the existing law the provision here in issue, for deportation on the basis of membership at any time in the past in the Communist Party. The sections effecting this addition, as incorporated in Title 8 of the United States Code, read as follows, at the time involved in this case:

"§ 137. * * *

Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * *.

§ 137-3. * * *

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 137 (2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."[1]

[1] These provisions were recodified and reenacted without material change by the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 204) and now appear in the United States Code as 8 U. S. C. 1251(a)(6)(C).

Statement of the Case

Facts

Petitioner, a native-born citizen of Mexico, entered the United States legally with his mother and sister in 1918 at the age of six, and has resided here continuously for the past thirty-five years (T. 174-175).[2] He is married to a native-born American citizen, and is the father and sole support of four native-born American citizen children, aged 8, 11, 13 and 14 (T. 176, 61).

Since 1940 petitioner has worked at the Van Camp Sea Food Company and in 1944 was a member of the union in that company's plant pursuant to a union shop agreement (T. 37). With the encouragement of the leaders of his union he joined the Communist Political Association in 1944 (T. 177-180), at a time when the Communist Party had been dissolved. See *Dennis* v. *United States*, 341 U. S. 494, 498.[2a] After the transformation of the Association into the Communist Party with objectives diametrically opposed to those of the Association (*ibid.*), there is no evidence as to petitioner's joining the Party, although he apparently attended its meetings (T. 179, 188). While the one witness who testified against him stated that she had seen him at meetings closed to "Party members," she did not differentiate in her testimony between members of the Party and the Association, nor did she indicate what she considered the indicia of Party membership nor the basis for her conclusion that the meetings were of the character she attributed to them (T. 114, 127).

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[2] Petitioner, because of poverty, was granted leave to proceed in this Court on the typewritten record. The record is in two parts, the record of proceedings in the Court of Appeals, herein designated "R." and the record of proceedings in the District Court, herein designated "T."

[2a] The instant record does not make clear that the name of the organization petitioner joined in 1944 was the Communist Political Association.

Proceedings

After two sworn statements had been taken from petitioner by an Examining Inspector on March 17, 1948 (T. 173) and March 31, 1948 (T. 183), respectively, a warrant was issued charging him with membership in an organization advocating, and with distributing literature advocating, violent overthrow of the Government (T. 68). Hearings were held under this warrant on March 10, 1949 (T. 68) and January 12, 1950 (T. 78). When these hearings were rendered invalid by the decision of this Court holding that the Administrative Procedure Act was applicable to deportation proceedings, a new hearing was held on December 12, 1950 (T. 33). At this hearing the record of the previous hearings as well as petitioner's statements to the Examining Officer in March 1948 were admitted as exhibits (T. 34, 35). Because the statutory amendment providing for deportation for past membership in the Communist Party (supra, p. 2) had been passed in the interim between the first and second hearing, the additional charge was lodged against petitioner in the course of the second hearing that he had been a member of the Communist Party of the United States (T. 36).

On December 19, 1950, the hearing officer found that petitioner had been a member of the Communist Party from 1944 to 1948, and ordered his deportation on that ground under the 1950 Act (T. 31-32). On July 25, 1951, the findings and decision of the hearing officer were adopted by the Assistant Commissioner, and, on September 26, 1951, an appeal was dismissed by the Board of Immigration Appeals.

Petitioner's petition for a writ of habeas corpus, filed in the District Court for the Southern District of California on December 17, 1951 (R. 5), alleged *inter alia* that the evidence did not show that petitioner ever belonged to the Communist Party (R. 2), that he never had any intent to join it nor did he subscribe to its doctrines (R. 3), nor

did he ever believe in the violent overthrow of the United States government (R. 3), and that the deportation order rested on an erroneous construction of the term "member" in the deportation act (R. 3). On January 23, 1952, the District Court denied the petition (R. 16-17), and on appeal to the Court of Appeals for the Ninth Circuit, that Court affirmed the District Court's order (R. 27-34).

Specification of Errors

1. The conclusion that petitioner was a member of the Communist Party within the meaning of the deportation statute is arbitrary and without support in the evidence. The order for his deportation on the basis of such membership is therefore unauthorized by the act and in violation of the due process guarantee of the Constitution.

2. The statute as here interpreted to provide for deportation on the sole basis of past membership in the Communist Party, is unconstitutional, because it is not reasonably related to the Constitutionally permissible objective of the deportation power and penalizes innocent as well as knowing membership.

3. The provision for deportation of persons who have at any time in the past been members of the Communist Party violates the due process guarantee of the Constitution in that it substitutes legislative fiat for the fair hearing ensured by this guarantee.

4. The statute as here interpreted violates the Constitutional prohibition of bills of attainder and ex post facto laws.

Summary of Argument

I

A. The only evidence in the record that petitioner join any organization relates to his joining the Communi Political Association in 1944 at a time when the Communi Party was non-existent. The Association's program wa according to this Court's opinion in the *Dennis* case, "o of cooperation" and support of this Government (341 U. at p. 498). When the Association was transformed in the Communist Party with a program diametrically o posed to that of the Association, there is no evidence of p titioner's joining the latter. There was no showing wha soever of the usual indicia of membership, such as application for membership or payment of dues. And a presumption that his membership in the first organizati was transferred to the second is refuted by the great di ference in the aims of the two organizations, by petitione lack of sympathy for the Party's aims, and by his condu in regard to the Party; it is further refuted, viewing t situation from the Party's standpoint, by the unlikeliho that it would have regarded the transfer of his membe ship as desirable.

Not only is the order of deportation unsupported evidence, but it is based on an erroneous interpretation the term membership which, under this Court's decisio must be construed as connoting a serious, intentional a definite commitment to the Communist Party.

II

A. A deportation statute which is wholly arbitrary a bears no relation to the objective of ridding the country undesirable residents, is outside the Constitutional pow of Congress. The instant statute is not reasonably relat to that objective on the basis suggested in the *Harisiad*

case that withdrawal from the Party was unlikely to reflect a change in viewpoint. In *Harisiades* the Court had before it resignations during a juncture in Party affairs which made resignations for the purpose of concealing membership a likelihood. But in withdrawals at ordinary times, as in petitioner's case, rather than at such special periods, the circumstances point to a presumption that the withdrawals were in good faith. Thus, the instant statute cannot be justified on the assumption that the numerous aliens who withdrew from membership in the ordinary course of affairs over the entire thirty-five-year span of the Party's existence, which is covered by the instant statute, did so as a mere ruse rather than because of an honest change of conviction.

B. The statute is arbitrary not only because it makes deportable those who have rejected whatever belief they may have once had in violent overthrow, but also because it makes deportable those who never had such a belief.

Petitioner's case is typical of those who entered the Communist Party (assuming arguendo he did so), supposing that it was, as it appeared to be to the uninitiated at the time they joined, a democratic "progressive" organization, and who were not, during their brief membership, taken into the more advanced echelons which would have known of its advocacy of violence. During the 1930's and early 40's, when the Party's membership expanded and the instant statute would therefore have its greatest applicability, the Party emphasized to the general public and its own rank and file membership, devotion and support to this Government, rather than opposition to it. Its literature at that period, far from advocating violence, urged the necessity of resort to the ballot to elect its candidates to political office. The courts approved its place on the ballot, and this Court as well as others, held that the evidence was not convincing that it advocated violence, even when the most damaging of the Party documents was presented to

them. Unlike Harisiades but like petitioner, the great majority of the members did not become part of the inner core of the Party which may be presumed to have been familiar with its covert doctrine of violent overthrow. Thus, it is arbitrary and against reason to assume from mere membership in the Communist Party at any and all times in the past a knowledge that its leaders advocated violence. Nor, by the same token, can it be reasoned that persons who joined the Party at any and all past times were imbued with a spirit of defiance towards our Government, rather than that they were misled by its professed aims of social progress.

C. This Court has never to date approved imposition of a penalty on innocent membership. In a consistent line of cases this Court has held that membership in an organization advocating violence could only be deemed a disqualification for public office or employment if it were informed and knowing membership. These holdings are clearly applicable to the instant statute, for: in the case of qualification for public employment as in the case of deportation of aliens, only the most minimal Constitutional protection is deemed applicable; the public security is equally or even more at stake in the subversion of government employees than in deportation of aliens; and the deprivation here imposed because of membership is far harsher than the loss of employment—indeed, loss of employment is only one element of the deprivation when the penalty is deportation.

D. If the statute is read as imposing the penalty of deportation on innocent as well as knowing membership, it is unfairly retrospective, and imposes deportation on persons who had no warning that their activity would be so penalized. Despite the limited protection accorded aliens under due process, this Court's decisions establish the applicability to deportation of the Constitutional doctrine

that the Government must give notice of the acts it will penalize.

E. The statute, as it has here been interpreted, is unconstitutional for the further reason that it imposes, without reasonable justification, a drastic restraint on the First Amendment rights to which resident aliens are entitled. If without warning, aliens who have been innocent members of organizations can thereafter be subjected to deportation for their past membership, it is apparent that aliens will be restrained from participating in even the most innocent-appearing organizations.

To save the statute from doubts as to its constitutionality and to accord with its true intent, it should be construed as applying only to membership in the Communist Party with knowledge of its advocacy of violence.

III

Congress' proscription in the instant statute of former members of the Communist Party for the penalty of deportation, violates the basic Constitutional principle against special legislation. Particularly since the statute decides the undesirability for residence not only of aliens who are at present Communist Party members but of those who have been members at any time in the past on the basis of the assumed character of the Communist Party at all past times, Congress has departed from its proper function of enacting policies and principles of general applicability and has instead engaged in adjudication by fiat.

By establishing a presumption as to Communist Party membership at all past times, the Act deprives the alien of his right under due process to a fair hearing. For he gets no hearing as to the existence of the fact which is the supposed basis for inferring his undesirability: the organization's advocacy of violence during his membership. Like the treatment of charges against Government employees involved in *Joint Anti Fascist Committee* v. *Mc-*

Grath, 341 U. S. 123, and the criminal charge in *United States* v. *Spector,* 343 U. S. 169, the elements establishing deportability are divided, and a vital element is subtracted from consideration in the hearing. Such a substitution of fiat for a quasi-judicial determination is a method of nullifying the guarantee of due process.

IV

A statute like the instant one, singling out a named class of persons for a penalty and imposing the penalty on the basis of past conduct so that there is no possibility of escaping the legislative proscription, is a typical bill of attainder. All the statutes that this Court has held to be bills of attainder have, like the instant one, employed civil sanctions; and all of them have been defended in like vein, on the allegation that they were regulatory measures directed at the prevention of some evil, rather than attempts to punish the designated groups. But as this Court said recently: "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'" *Garner* v. *Los Angeles Board,* 341 U. S. 716, 722.

The determinative circumstance in every decision holding a statute to be a bill of attainder was the Court's conclusion that it did not in fact bear the alleged reasonable relation to the prevention of an evil, and therefore must be deemed a legislative effort at punishment in the mere guise of a regulatory measure. Since the instant statute as here interpreted is not reasonably related to the alleged evil and to the only purpose for which the deportation power can Constitutionally be used: ridding the country of undesirable residents,—it is a bill of attainder on the proscribed group.

Besides violating the Constitutional prohibition on bills of attainder, the instant statute as here interpreted vio-

lates the related prohibition on ex post facto laws. Under the latter clause, as well, a statute imposing a civil sanction is deemed to impose a punishment if it is not reasonably related to the evil at which it is allegedly directed. Judged by this test, the instant statute as here interpreted must be deemed to impose a punishment; and since it imposes punishment after the fact on acts that were done innocently and with no warning of a penalty at the time thereof, it is *ex post facto.*

ARGUMENT

I. The conclusion that petitioner was a member of the Communist Party within the meaning of the deportation statute is arbitrary and without support in the evidence. The order for his deportation on the basis of such membership is therefore unauthorized by the Act and in violation of the due process guarantee of the Constitution.

We shall show that all the evidence in the record as to petitioner's joining of an organization relates to his joining an organization in 1944, at a time when the Communist Party was non-existent. The Communist Party was dissolved in 1943, and its reconstitution did not commence until 1945. *Dennis* v. *United States*, 341 U. S. 494, 498, note 1. It is clear from this circumstance and from the record that if petitioner in fact took out membership in any organization in 1944, it was in the Communist Political Association, whose program was, according to this Court "one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period" (*ibid.*). After the transformation of the Association into the Communist Party with a program diametrically opposed to that of the Association (341 U. S. at p. 498), there is no evidence that petitioner either took out membership in the Party or that any membership he possessed in the Communist Political

Association was transferred to the Party; indeed, the evidence all refutes these conclusions. Lacking support in the evidence, the deportation order is void. *Tisi* v. *Tod,* 264 U. S. 131, 133; *Kessler* v. *Strecker,* 307 U. S. 22, 34. We are, of course, aware that the Internal Security Act provides for deportation for membership in the Association as well as in the Communist Party; however, we assume this Court will only consider the validity of the deportation order as written by the Immigration officials. It is to be noted that the provision for deportation for membership in the Communist Political Association raises even graver constitutional questions than does the provision under which the instant order was framed.[3]

A. Failure of Evidence as to Communist Party Membership.

In petitioner's preliminary examination by an Examining Inspector, which is the major source of the evidence against him, petitioner said,—in answer to a question about his being asked to join "the Communist Party" in 1944: "I was told that it wasn't a party at that time; that it was a political assocation. * * * They had no intention of overthrowing the Government or anything; they were just trying to improve the living conditions of the people, of the working class" (T. 179). His understanding that he was being asked in 1944 to join the Communist Political Association, and that its nature was peaceful and democratic is of course fully corroborated by the facts, as related by this Court in the *Dennis* opinion, and there is no word to the contrary in the present record. The fact that petitioner did not attempt to correct and contradict the examining officer when the latter kept referring during the examination to the Communist Party, although it in fact did not then exist and petitioner was well aware of the distinct characteristics of the Association, is wholly attributable to the circum-

[3] This may explain the Immigration Service's concentration on attempting to bring the petitioner within the provision respecting membership in the Communist Party rather than the Association.

stances of the examination. Petitioner was not accorded the right to counsel; and a perusal of the examination as a whole clearly indicates he had been led to believe that acquiescence and docility, rather than an attempt at self-defense, was his best chance to avoid deportation. When formal charges were nevertheless lodged, his right to counsel in his hearing on the charges was of little avail, since his acquiescent replies to the misleading questions on the preliminary examination were introduced in evidence against him.[4] The circumstance that the petitioner, misled by the Examining Inspector, did not draw a distinction in nomenclature between the Communist Political Association and the Communist Party is immaterial; the distinction in program and objective was clear to him and the material fact is that the organization he allegedly joined in 1944 was not the Communist Party, as the Immigration Service found, but was in fact the Association.

While we doubt there is trustworthy evidence that petitioner took the step of becoming a member even of the Communist Political Association, we shall assume arguendo that he was such a member and proceed to consider his status vis-a-vis the Communist Party. Some time in 1946 after the national top leaders of the Communist Political Association had commenced "to transform that organization into the Communist Party" and to change its policies "from peaceful cooperation with the United States * * * to a policy * * * which worked for the overthrow of the Government by force and violence" (*Dennis*, 341 U. S. at p. 498), one George Lohr took charge of Communist Party affairs in petitioner's locality, and apparently took over the meetings of the erstwhile Communist Political Associa-

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[4] It may also be noted that petitioner was not allowed the benefit of counsel in determining whether to claim the privlege against self-incrimination in his preliminary examination, and that his subsequent claim, on the advice of counsel, was of no avail because the record of the preliminary examination was introduced against him (T. 94-98, 104).

tion. Lohr began to express the view that "the Party thought it had been neglecting its role and that Capitalism could no longer be trusted," leading petitioner to "believe that they (sic) were going to take more drastic means as far as action in politics was concerned" (T. 187-8). About six months after Lohr launched the new regime, petitioner stopped attending meetings (T. 188).

There is no evidence whatsoever of petitioner's engaging in any act to secure membership in the Communist Party, such as applying for membership, receiving a membership card, or paying dues. Indeed, while the ex-Party member who was the Government's witness testified as to her Party membership card (T. 116) and as to the collection of dues (T. 120), there is a conspicuous failure to question her as to petitioner's possession of a card or the collection of dues from him.

While we would concede that ordinarily there might be an inference from the fact one organization is transformed into another, that a member of the former became a member of the latter, there is the strongest countervailing evidence against any such presumption in the instant case. The Communist Party, as reconstituted, was, according to the *Dennis* opinion, the antithesis of the organization petitioner had joined (341 U. S. at p. 498); rather than advocating overthrow of the Government, the Association had emphasized support and assistance to the Government in the war effort and in the social betterment measures concomitant to prosecution of the war. The record indicates that petitioner's interest in these objectives of the Association was stimulated in the labor union to which he belonged, perforce, under a union shop agreement in the plant where he had been employed for several years (T. 37, 185, 180). In addition to this basis for his interest in the Association, the record indicates that, with the encouragement of the leaders of the union, he hoped through affiliation with the Association to gain advancement to an office

in the union (T. 180, 178, 127).[5] But there is no shred of evidence that he ever had any sympathy, or could have been led to have any sympathy, for the goal of overthrowing or opposing our Government. Indeed, affirmative evidence that he had no such sympathy is supplied not only by his own statements of his belief (T. 181; and see T. 185), but by the fact that such a doctrine was apparently contrary to his religious convictions (T. 180), and by his willingness to now join the Communist Party for the purpose of giving information about it to the Government (T. 182, 188). Under all these circumstances, particularly the dissimilarity of the organizations, no inference of membership in the organization emerging from the transformation can be drawn from membership in the original one.

Viewing the matter from the Communist Party's standpoint it is as unreasonable to assume petitioner became a member, as it is viewed from petitioner's. It is not to be supposed in the absence of evidence to this effect, that when the Party attempted to organize as the conspiracy described in the *Dennis* case—"adept at infiltration into strategic positions, use of aliases, and double-meaning language * * * [and] rigidly controlled" (341 U. S. at p. 498)—that it would have automatically absorbed into membership those who differed from its objectives, who had never indulged in secrecy, aliases, or conspiracy. It is particularly unlikely that the Party would have considered it suitable to automatically absorb a person who, like petitioner, had had no connection with the Party prior to the days of the Communist Political Association. It cannot be assumed that the Party would have absorbed such a person with no

[5] It is to be noted that in 1950 after the reconstitution of the Communist Party and after the "cold war" with Russia drew the battle-lines between Communist and non-Communist more clearly, the C.I.O. expelled this union, which was part of the Food, Tobacco, Agricultural, and Allied Workers Union of America, among others as Communist-dominated. See *Tisa* v. *Potofsky*, 90 Fed. Supp. 175 (S. D. N. Y., 1951); Proceedings, 12th Constitutional Convention of Congress of Industrial Organizations (Nov. 20-24, 1950), p. 69.

Party background into membership without some subscription on his part to the principle of overthrow, of which there is here no scintilla of evidence. Moreover, it is to be remembered that the Party adopted the policy in 1939 of excluding aliens from membership (see *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 595).[6] Thus, there is not only no evidence of petitioner's membership in the Communist Party, but no basis either from his standpoint or the Party's,[7] for supposing it existed.

Certainly petitioner's attendance at meetings for a limited time after the Party was reconstituted does not support the deportation order. The statute requires membership, not mere attendance at meetings. In the absence of any evidence that he assumed membership in the Party, it can only be inferred that he continued attending meetings held at the site and under the same general supervision as the Association's, until he became aware of the transformation of the Association. Indeed, his attendance under the circumstances does not even reflect any type of sympathy for the Party's aims. While the reconstitution of the Party by the top national leaders commenced in April 1945, there is no evidence of the date when local leaders

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[6] It should be noted that Meza, the witness against petitioner, who was a Party member, was an American citizen (T. 111). The Party policy was adopted to avoid deportation proceedings on the basis of the alien's current membership (342 U. S. at p. 593), and therefore would have continued at least until the *Harisiades* decision countenanced deportation of some past members.

[7] But even assuming that the Party considered all members of the Association, including aliens, as Party members, such a transfer of "membership" without an expression of agreement by the purported member, from the organization he joined to one of diametrically opposed principles, could hardly be considered the voluntary membership intended by the Act. As to the Act's coverage only of voluntary membership, see remarks of Senator McCarran, the Act's sponsor, in discussing an amendment thereto, that "'such membership must be a *real* membership * * * I do not think that Congress meant to authorize the expulsion of aliens who pass from one organization into another, supposing the change to be a mere change of name * * *'." 97 Cong Rec., Part 2, p. 2373 (March 14, 1951).

adequate to launch the new program were found and the transformation of the small local units of the Association was initiated. There is thus no reason to disbelieve petitioner's testimony that he stopped attending meetings after the Party's program was in part revealed (T. 187-188).[8]

The mere name "Communist Party" if it was used at the initial meetings after the Party's reconstitution, was certainly not sufficient to demonstrate to petitioner that the organization was to advocate violent overthrow of the Government. In 1942 the highest court of California, and in 1944 the District Court of Appeal of California in the area in which petitioner was living, had ruled that the Communist Party had a right to be on the ballot in California,[9] and it so appeared on the ballot as a regular political party during the early '40s. That the Party carried on substantial political activity in that period and that its political role appeared authentic, is attested by the fact that over 57,000 voters voted for the Communist candidates in the 1940 elections in California and over 26,000 in 1942.[10] Such political activity is the antithesis of advocacy of violence (see *Harisiades*, 342 U. S. at p. 592). Indeed, all the pronouncements and literature of which the public, including petitioner, could have known in the '30s and early '40s dealt with peaceful and democratic reform (for further discussion of the Party's democratic guise at that period, see infra, pp. 29-30). Further, in this Court's

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[8] Compare, for example, the fact that the dissolution of the Communist Party nationally, which commenced in 1943 according to the *Dennis* opinion, was not endorsed in California until a meeting of the State Convention on May 7, 1944, and was not announced to the general membership in the newspaper of the Los Angeles County Committee until May 16, 1944. See *Record*, publication of the Los Angeles County Committee of the Communist Party, for May 16, 1944, p. 1, col. 1 (on file in the Office of the Clerk of this Court).

[9] *Communist Party* v. *Peek*, 20 Cal. 2d 536, and *Deming* v. *Communist Party*, 64 Cal. App. 2d 35, respectively.

[10] Figures on file at the Office of the Registrar of Voters, Los Angeles, California.

decision in the *Schneiderman* case in 1943, which undoubtedly was given substantial publicity in California, because it involved a prominent California Communist, the Court had held it was a "tenable conclusion" on the basis even of the Party's more esoteric and scholastic pronouncements, that the Party did not advocate violent overthrow of the Government.[11] Accordingly, petitioner could not have had notice that "Communist Party" meant advocacy of violence.

Thus, there not only is no evidence of the usual indicia of Communist Party membership—such as application for membership, payment of dues, adoption of a Party name—but there is no evidence of a sympathy for the Party's objective which might have led to membership, and indeed there is affirmative evidence of a lack of sympathy. Further, it is clear and undisputed that petitioner severed his contact with the Party by merely stopping coming to meetings, and this was the end of the matter (T. 179-180). This is hardly the way the Party, established as the conspiratorial organization described in the *Dennis* case, would have permitted a member to act.

The testimony of Meza, the sole witness called by the Government, does not contradict our conclusion that the deportation order lacks support in the evidence. In examining her as in examining petitioner, the Immigration Inspectors manifested a shocking failure to try seriously to ascertain the facts bearing on petitioner's Communist Party membership or lack of it, and a shocking disregard of the important and obvious distinction between the Communist Political Association and the Communist Party. Instead, the Examining Inspector again attempted

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[11] *Schneiderman* v. *United States*, 320 U. S. 118, at p. 157. This Court there also noted an earlier decision in the Federal Judicial Circuit covering California that judicial notice could not be taken of force and violence as a Communist Party principle and that the evidence presented as to its principles in 1922 was not applicable a decade later. *Ex parte Fierstein*, 41 F. 2d 53 (C. A. 9th, 1930).

to rest on petitioner's alleged "admissions" and to fill the gaps in the witness' testimony through the suggestive phraseology of his own questions. Thus, asking Meza whether she recalled any conversation with petitioner "in regard to the Communist Party" (T. 125), the Examining Inspector elicited the answer that petitioner had told her "how he had become a member of the Communist Party because they had * * * promised * * * that he would be secretary-treasurer * * * of the local [union]" (T. 127). The Immigration Service ignored the fact that petitioner's remarks to Meza unquestionably related to his joining the Communist Political Association in 1944; it is to be noted that he became secretary-treasurer of the local in 1944 or at the latest early 1945 (T. 38-39).

Meza also testified as to petitioner's position, at a date as to which she was considerably confused,[12] in a group called the Spanish Speaking Club (T. 118-119). Contrary to the statement in the Government's brief in opposition to the petition for certiorari, Meza at no time called this Club a "unit" of the Communist Party. This terminology was used solely by the Examining Inspector (T. 110-127; as to the witness, see also T. 156-157). On the contrary, her testimony made it clear that this Club was *not* a Communist unit and that it was instead an organization of the type the Communists joined in their "United Popular Front" period which included Communists and non-Communists. For Meza testified that meetings were held that were open only to the members of the Club who were Communists (T. 114), a situation clearly contradictory to the Examiner's assumption that the Club as a whole was a Party unit. She further testified that the meetings that were "closed * * * to Communist members" were attended by petitioner (T. 114). We submit, however, that in view

[12] Confusion, reflecting heavily on Meza's credibility, is evident throughout her testimony. Thus, on the one hand she claims that she was opposed to the Party at the time she joined it (T. 137), and on the other she speaks of her unhappiness at developments in the Communist line as if she had been a bona fide member (T. 134).

of the lack of distinction in her testimony between membership in the Association and membership in the Communist Party, and in view of the utter failure of the Inspectors to determine how she knew the persons present at the alleged meetings to be Communist Party members or what she considered to be indicia of membership or of a "closed" meeting, her statement that the people present at these meetings were Party "members" is not evidence, but is merely an unreliable conclusion of the witness. Certainly, her layman's description of the persons at these meetings as "members," without more, does not support the conclusion that petitioner was a member of the Communist Party within the meaning of the Internal Security Act and is to be deported as such.

B. Construction of Term "Member" in Deportation Provision.

This Court and the Court of Appeals have made it clear that "membership" within the meaning of the deportation statutes requires a definite and serious commitment from the alleged member to the organization and a connection between them of real content. While "affiliation" has been discussed more extensively than "membership", because definite indicia of membership such as issuance of a Party book or payment of dues—all completely lacking in the instant case—are customarily relied upon, it is clear that "membership" is considered an even stronger bond than "affiliation." If the connection is insufficient to amount to "affiliation," it is *a fortiori* that it does not amount to "membership."

In ruling on the meaning of affiliation in *Bridges* v. *Wixon*, 326 U. S. 135, this Court said:

> "It imports * * * less than membership but more than sympathy. * * * Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the

> proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition" (at pp. 143-144).

And the Court quoted with approval (326 U. S. at p. 142) the language of the Court of Appeals for the Second Circuit in *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2, 1935), holding that affiliation with the Communist Party is not proved unless the alien is

> "more than merely in sympathy with its aims. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith."

In discussing the intent of the Act, Senator McCarran, its sponsor, pointed out that the term member was intended to be given the same construction it had been given under previous acts.[13] Furthermore, he particularly emphasized and quoted the language of a lower court opinion as to the original 1918 Act that the Act was intended only to refer to "real membership" and not to persons alleged to be "members," but who had no "real knowledge" of the organization's "platform and purposes."[13a]

Even aside from the sponsor's statement, it is apparent that under the Internal Security Act, which is more extreme than any of the previous statutes in that it provides for deportation on a mere showing of past membership in a named organization, at least as rigorous a concept of membership as that prevailing under past Acts must have been intended.[14] The evidence here wholly fails

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[13] See Cong. Rec., loc. cit. *supra* note 7.

[13a] Ibid.

[14] Compare *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10: a statute inflicting the harsh penalty of deportation must be strictly construed.

to meet this test: There are no formal indicia of membership; there is no evidence of an aim to further the objective of the Communist Party; there is no evidence of any relationship of dependability having been established between the Party and petitioner; on the contrary, when petitioner discovered the objectives of the Party, he simply stopped coming to meetings. Membership cannot be found with such casual unconcern for the meaning of the term and for the evidence as it was in the instant case.

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The order of deportation is void because it is without support in the evidence (*Tisi* v. *Tod*, 264 U. S. 131, 133; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106) and because, as in the *Bridges* case, the "alien is ordered deported for reasons not specified by Congress," in that the finding, there of affiliation, here of membership, "was based on too loose a meaning of the term" (326 U. S. at p. 149).

The conclusion of the lower courts that the order was supported by evidence is clearly erroneous. These courts totally ignored the deficiencies in evidence and, like the Immigration Service, were apparently not alert to the real and important distinction between the Association and the Communist Party;[15] further they gave no consideration to the meaning of "membership" as used in the Internal Security Act. This Court's duty of review is greater than ordinary where as here the validity of the order depends on the decision of a question of law—the construction of the statute—and where, in addition, the lower court did not have any greater opportunity than this Court to ap-

[15] We suggest that even if this Court should believe there might be evidence to support the conclusion that petitioner became a member of the Communist Party after it was re-constituted in 1945, the conclusion that he was a member in 1944, when the Party was nonexistent, is indisputably erroneous. Since the Commissioner might not have found petitioner was a Party member at any time except for the indisputably erroneous premise that he joined it in 1944, for this reason alone the deportation order should not be upheld. Cf. *Securities and Exchange Commission* v. *Chenery*, 318 U. S. 80.

praise the credibility of witnesses. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671. And where deportation of a long-time resident—a penalty which may deprive him "of all that makes life worth living"[16] is involved, the Court's duty of securing for him all procedural safeguards to which he is entitled, is of the highest moment. *Bridges* v. *Wixon*, 326 U. S. at p. 154.

II. The statute as here interpreted to provide for deportation on the sole basis of past membership in the Communist Party, is unconstitutional because it is not reasonably related to the constitutional objective of the deportation power and penalizes innocent as well as knowing membership.

A. The statutory provision, as here interpreted, is outside the deportation power of Congress because it is not reasonably related to the constitutional objective of the power.

Despite the broad discretion of Congress to determine the classes of aliens subject to deportation, this Court has never suggested that the power can be used arbitrarily or without relation to the purpose for which it is possessed by Congress. Even in the case of the plenary and sovereign power to make war, and even when it is invoked in the face of a crisis endangering national survival, its purported exercise must show a reasonable relation to the Constitutionally intended purpose of this power. *Hirabayashi* v. *United States*, 320 U. S. 81, 94-95; *Korematsu* v. *United States*, 323 U. S. 214, 217-219; *Ex Parte Endo*, 323 U. S. 283. So, too, the power to deport must be exercised " 'under the paramount law of the Constitution' " (*Carlson* v. *Landon*, 342 U. S. 524, 537). Thus, in the *Harisiades* case,[17] this Court, while pointing to the breadth of Congressional discretion, in no way countenanced the view that the deporta-

[16] *Ng Fung Ho* v. *White*, 259 U. S. 276, 284.

[17] *Harisiades* v. *Shaughnessy*, 342 U. S. 580.

tion power could be exercised without relation to its intended purpose: the purpose of ridding the country of aliens who are undesirable residents.[17a] Indeed, if the statute has no reasonable relation to this end, it is not a bona fide exercise of the power, but is merely a disguised attempt to accomplish a purpose outside of Congressional competence.[18]

1. Meaning of Resignation From Party Under Ordinary Circumstances.

In the *Harisiades* case this Court dealt with a provision which, like the instant one, based deportation on past organizational membership; there, the statutory basis for deportation was membership in an organization found to have been advocating violent overthrow of the Government at the time of membership, and the Communist Party was found, after hearing, to be such an organization. But neither Harisiades nor Coleman, whose case was joined to his, had, as the opinion and Government brief in the case emphasize,[19] resigned their membership because of a changed viewpoint; they ceased to be members because the Party discontinued the membership of alien members in 1939 in order to avoid the effect of the deportation laws, as interpreted in that year. Thus, this Court found that the criterion of past membership in the organization could be deemed related to present undesirability in that discontinuance of membership might very well show no

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[17a] The Court of Appeals in that case was willing to "assume that a statute would be invalid which directed deportation for some cause having no rational relation to the public welfare." *Harisiades* v. *Shaughnessy*, 187 F. 2d 137, 141 (C. A. 2, 1951).

[18] See *Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330; *Interstate Commerce Commission* v. *Oregon*, 288 U. S. 14; *The Pipe Line Cases Cases*, 234 U. S. 548.

[19] See 342 U. S. at pp. 582-583, 595; see Government's brief, pp. 4, 10, 85-86.

"change of heart" on the part of the alien (342 U. S. at pp. 595, 593).

We contend, however, that this reasoning is inapplicable to the statute now at bar. To take the case of petitioner as an initial illustration—unless guilt is to be conclusively presumed in disregard of the realistic probabilities, there is no reason whatsoever to doubt that petitioner's severance of Party membership (assuming arguendo he possessed it), was bona fide. We agree that resignation would not be likely to show a changed philosophy if it occurred at the time of some particular juncture in Party affairs: for example, in 1939, the year involved in the *Harisiades* case; or at the commencement of the current prosecutions of Communists under the Alien Registration Act, upheld in the *Dennis* case in 1951. But absent a special juncture in Party affairs making dissimulation a likelihood, it is much more probable than not that a resignation is bona fide. Indeed, the basic premise of our democracy, that truth will be accepted over error, indicates the likelihood that Communists will come to recognize their error; and in the absence of a particular crisis in Party affairs that would stimulate a ruse as to membership, this likelihood must be credited. And it is to be noted that as to the great majority of past members of the Party, Party membership was not sufficiently prolonged to indicate Party doctrine gained a deep foothold; for, on the basis of F. B. I. figures, it appears that among the approximately 700,000 past members of the Communist Party in this country, the average length of membership was two or three years.[20]

That Congress itself made provision for the change of heart of a past Party member is apparent in the statutory provision allowing naturalization of aliens who have not been members for ten years prior to their petition for nat-

[20] Ernst and Loth, *Report on the American Communist* (1952) p. 14.

uralization;[21] aliens who have not been members for ten, twenty or thirty years, however, are automatically deportable under the instant provision. Indeed, as here interpreted, a past member would be deportable though his change of view had been manifested in his having "actively opposed" the Communist ideology,[22]—opposition which would, moreover, remove the barrier to his admission to this country if he were a non-resident seeking admission.[23] And as pointed out by the President's Commission on Immigration and Naturalization, criticizing the instant provision, those who have left the Party in good faith are likely to be more strongly opposed to it than the average person, because they have actually experienced its operations.[24] Thus, considering that the instant provision covers everyone who has ever been a member of the Communist Party no matter how long in the past and no matter when or how his resignation occurred, it is highly unreasonable, arbitrary, and punitive.

Even in the situation considered in *Harisiades,* where concededly there was some likelihood the resignation lacked

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[21] See section 25 of the Internal Security Act of 1950, amending section 305(c) of the Nationality Act of 1940, now codified as 8 U. S. C. 1424(c).

[22] See, for example, the opinion of the Board of Immigration Appeals in *In re Mita* (pending for review in the District Court for the District of Columbia, in *Mita* v. *Brownell,* Civil Action 5397-53), where the Board said the "sole issue" before it was whether Mita had been a Party member, and "even present hostility to Communism, if such exists; or loyalty to the United States, if that be demonstrated," is irrelevant. See also *Gomez* v. *Brownell,* pending in the same Court (Civil Action 4914-53), where the past member attended two meetings in 1937 and resigned because membership conflicted with his faith in Catholicism.

[23] 8 U. S. C. 212(a)(28)(I), subd. b. Thus, aliens who are ordered deported under the instant provision both are eligible for naturalization and are aceptable for admission to this country.

[24] *Whom We Shall Welcome,* Report of the President's Commission on Immigration and Naturalization (submitted Jan. 1, 1953 to the President) pp. 227-228.

bona fides, we submit it was nevertheless unprecedented for this Court to suggest that ex-members who had in good faith had a "change of heart", were deportable along with those who had not, because it might be "an almost impossible burden" for the administrators to separate them (342 U. S. at p. 595). This court has heretofore condoned the Government's failure, because of difficulties of proof, to separate the innocent from the guilty only under conditions of national crisis when the danger was so imminent that temporary emergency steps had to be taken and there was no time to make a distinction.[25] Further it is to be noted that proof of whether the resignation indicated a changed philosophy would not ordinarily be subjective or abstruse, but would depend on the circumstances surrounding the resignation and the situation of the Party at the time. No unusual difficulty is apparent, in determining that someone in a situation like Harisiades' did not show by his resignation a change of heart, and that a change was shown by a severance in a situation like petitioner's, the latter being, we submit, far more representative of the class deportable under the instant statute, considering that it covers the entire period of existence of the Communist Party.

2. Ignorance of Rank-and-File Past Member as to Party's Advocacy of Violence.

But even assuming there might be justification in reason for classing together all persons who had at any time subscribed to advocacy of violent overthrow, it is clearly arbitrary and unrelated to the objective of expelling undesirable residents, to class with them those who at *no* time so subscribed. The instant statute as here interpreted, makes aliens deportable who, not even in the past, believed in overthrow of the government. For the statute has been

[25] See *Hirabayashi, Koremats*u, and *Endo* cases, cited *supra*, p. 23.

interpreted as meaning that it is irrelevant whether the member even knew that this was the Party's objective (see Respondent's Return to Petition for habeas corpus, R. 8). This interpretation does not result merely in a few instances of injustice; we submit that there is a greater likelihood that an alien caught in this dragnet and unreasonable provision never believed in violence than that he did. We concede that if there were any indication of the alien's present connection with the Party he might be deemed dangerous regardless of whether he subscribed to Party principles; but where the possibility of his dangerous activity rests on the possibility of his continuing under the influence of a belief he had in the past, it is obvious that his expulsion has no connection with danger if he did not even in the past have the proscribed belief.

To take petitioner's case again as an initial illustration, if we assume arguendo that petitioner became a member of the Communist Party, there is no doubt that the avenue through which he came to the Party was the Communist Political Association which stood for peaceful and democratic support of the Government (see, *supra,* pp. 11-12). Considering this basis for his introduction to the Party, and considering that he dropped out of it after its program of more belligerent action was in part revealed to him (*supra,* pp. 14-18), it would be an application of "guilt by association" to the point of complete arbitrariness to assume that he embraced the Party's aim of overthrow of the Government. And, in view of the Party's representation of itself as a peaceful political party during its previous decade of existence (supra, p. 17 and infra, pp. 29-31), the petitioner had no reason to be on notice of the Party's subversive aim. The situation illustrated by petitioner's case is entirely different from that of the aliens in *Harisiades,* who had been active participants in the inner core of the

Communist Party,[26] and he is doubtless representative of many aliens who had belonged to the Communist Political Association and came into the Party briefly through the avenue of its appeal as a non-violent organization.

Perhaps more important in demonstrating the arbitrariness of the instant provision, is consideration of the Party's situation in the 1930's and early '40's, prior to the formation of the Communist Political Association, for it was then that it had its highest membership.[27] It was during this period that the Party, rather than standing for overthrow of the Government, emphasized collective security and assistance to the Government in fighting Fascism, as well as greater benefits under this Governmental system for labor and various minorities.[28] The Party membership card in the '30's made no mention of overthrow of the Government, merely glorifying the Party as "the vanguard of the working class." [29] Though earlier Party literature had

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[26] Thus, the Government's brief related as to Harisiades:

> By his own admission Harisiades was * * * an active functionary of the Communist Party from 1925 to 1939 * * *. He asserted his belief in Marxism-Leninism during the period of his membership, and stated that he still believed in those doctrines * * *. He participated in controlling the policies of a Communist newspaper and was Secretary of the Greek Bureau of the Communist Party * * *" (p. 47).

[27] As to the 1940's, see Ernest and Loth, *loc. cit. supra* note 20, at p. 33; as to the 1930's consider Wechsler, *Age of Suspicion* (1953) pp. 145-150; Hearings before Un-American Activities Committee of House of Representatives (83rd Cong., 1st Sess.) (Communist Methods of Infiltration, Education) pp. 4-14, 59-60, 107-109, 113; and the fact that the vote for Communist candidates nationally was over 102,000 in 1932 and over 80,000 in 1936 as compared to 48,579 in 1950. See New York Post, Dec. 17, 1953, p. 7, col. 1, reporting compilation of figures by the Democratic National Committee.

[28] See Hearings, *loc. cit. supra* note 27; Wechsler, *op. cit. supra* note 27, at pp. 86-88.

[29] *Strecker* v. *Kessler*, 95 F. 2d 976, 977 (C. A. 5th, 1938), affirmed on other grounds, 307 U. S. 22.

discussed violent overthrow,[30] literature circulated in this country during that decade not only did not urge violence, but did not hint of such a possibility. Thus, a leaflet circulated by the Communist Party of California in 1936, entitled "Why You Should Join the Communist Party" and soliciting members, represented that the Communist Party was fighting along with the Democratic Administration against Republican opposition, for higher wages, social security, labor rights, and collective security against fascist aggression (see Appendix to this brief, p. 61). And in "What is Communism," written for the more erudite public in 1936, by Earl Browder, the then head of the Party, it was represented that the Communists did not advocate violence.[31] A commentator even in a sophisticated non-Communist journal of opinion viewed the Party as a "grass roots" movement.[31a] The Party's 1942 literature was in the same democratic political vein as in the previous decade; it called for the election of Communist candidates because they were fighting for such things as child care centers, repeal of the sales tax, support of the Administration's tax program, "everything to win the war," and to "smash the fifth column" (see Appendix, p. 63). And the Party's 1942 program called for all-out production to support the war effort, maintenance of living standards, and "unity of the United Nations based on the American-British-Soviet alliance" (see Appendix, p. 65). Through the '30's and '40's, except during the Nazi-Soviet Pact, Party membership required no partisanship for Russia as against the United States because the Party

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[30] See *Schneiderman* v. *United States*, 320 U. S. 118.

[31] See note 52 (1942) Yale Law Journal, 108, 128, quoting Browder's book. And see similar analysis of Party position in Ward, *Communist Party and the Ballot*, 1 (1941) *Bill of Rights Review* (publication of American Bar Association) 286, 290.

[31a] See Barnes, *American Dream*, Atlantic Monthly for Jan., 1937, reprinted in Hearings on Institute of Pacific Relations, before the Subcommittee to investigate administration of the Internal Security Act of the Senate Judiciary Committee, 82nd Cong., 2d Sess., pp. 544-549.

emphasized only their allegedly common objectives. Indeed, even as late as 1946, the current knowledge and concept of the Communist Party as an advocate of overthrow of the Government was not full realized even in relatively suphisticated circles.[32]

The courts in the period in question were unconvinced that the Party advocated violence, and their opinions doubtless aided the Party to spread the view that it did not so advocate. In 1930, the Court of Appeals for the Ninth Circuit held that violent overthrow was not so clearly a principle of the Communist Party of the United States that it could be judicially noticed as such and that testimony as to the Party's character in 1922 did not establish its character in 1930.[33] And in 1938, in language recited in an affirming opinion of this Court, the Court of Appeals for the Fifth Circuit held on the basis of the Party membership book, which merely recited that the Communist Party was "the vanguard of the working class," and on the basis even of the Party literature selected by the Government to show advocacy of violence, as well as the Party's activity in the Presidential election, that there was no evidence of the Party's then advocating violent overthrow of the Government; it further held, to the same effect as the Ninth Circuit's ruling, that the decisions as to the Party's character in the 1920's were no longer applicable.[34] And in 1943 this Court, even on consideration of the Party's theoretical and pontifical literature of the 1920's said in the *Schneiderman* case:

> "For some time the question whether advocacy of governmental overthrow by force and violence is a principle of the Communist Party of the United States has perplexed courts, administrators, legislators, and

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[32] See Wechsler, *op. cit., supra*, note 27, at p. 223, describing viewpoint in 1946 of former Vice-President Wallace.

[33] *Ex parte Fierstein*, 41 F. 2d 53 (C. A. 9th, 1930).

[34] *Strecker* v. *Kessler*, cited *supra*, note 29.

> students * * *. With commendable candor the Government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that 'some communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal' * * *. The 1938 Constitution of the Communist Party of the United States, which petitioner claimed to be the first and only written constitution ever officially adopted by the Party * * * ostensibly eschews resort to force and violence as an element of Party tactics * * *. A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counteroverthrow * * * " (320 U. S. at pp. 147, 148, 156-157).

And of utmost significance is the circumstance that throughout this period the Party's conspicuous and undeniable activity not in theory but in fact, was that of a regular political party, backing candidates for numerous elective offices.[35] As already noted, the fact that it engaged in considerable propaganda on the political front and gave the appearance of being an authentic political party, is attested by the fact that the Communist candidates polled over 102,000 votes nationally in 1932, over 80,000 nationally in 1936, and in California alone 57,000 in 1940 and 26,000 in 1942 (see supra, notes 10, 27). This Court, in the *Harisiades* opinion, recognized "the freedom to advocate or promote Communism by means of the ballot box" and the antithesis between this method and violence.[36]

With the Party's overshadowing emphasis in the days of its largest membership on a non-violent program, with so

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[35] See cases cited *supra*, note 9, as to judicial approval in California of the Communist Party's appearance on the ballot. And see as to appearance on ballot generally, Ward, *op. cit., supra* note 31.

[36] 342 U. S. at p. 592. And see Ernst and Katz, *Speech: Public and Private*, 53 (1953) Columbia Law Rev. 620, as to the lack of danger from open propaganda.

much doubt in those days as to even its theoretical position on violence, with decisions of this Court as well as the lower courts giving currency to this doubt,[37] in view of these facts it is arbitrary and unreasonable to assume that violent overthrow was known as a basic tenet of the Party by the rank-and-file membership.[38] The Party was not during its "Popular Front" days the close-knit organization it was found to be the last few years; and even now this Court has indicated doubt that the full membership is party to the plans and intentions of the leaders.[39] That in prior decades the Party had many "dupes" as to the purposes of the inner core is indubitable. That it did not take the majority of its members, who only remained in the Party for two or three years (supra, p. 25)[40] into its inner councils, or trust this rapid-turnover group with knowledge of its illegal purpose, seems clear.[41] Nor is it conceivable that when it attracted 100,000 members during

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[37] The Court of Appeals' opinion in *Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C. A. 2nd, 1951) as to the Party's advocacy of violence seems based on the Party's character in 1925. But even if it be taken as referring to the 1930's, it is contemporaneous, rather than retrospective opinions, and in particular those carrying the prestige of this Court, that we must consider in determining whether aliens had reason by virtue of judicial opinions to realize that the Party had the aim of overthrow.

[38] Indeed, even if there had been Party pronouncements on this score, "every utterance of party leaders is not taken as party gospel." *Schneiderman* v. *United States*, 320 U. S. at p. 155. And see *Bridges* v. *Wixon*, 326 U. S. at pp. 147-148.

[39] See *Dennis* v. *United States*, 341 U. S. 494, 516.

[40] Compare *Dennis* v. *United States*, 183 F. 2d 201, 230 (C. A. 2, 1950), where the Court held that the defendants, because they were Party leaders and "had been affiliated with the Party * * * for many years" could be deemed to know the basic Party doctrine.

[41] And see note 52 (1942) Yale Law Journal, 108, 114: "* * * the difficulty of a member's achieving actual knowledge of the aims of an organization is illustrated by testimony of two of the government witnesses [in the *Bridges* case] that they were members of the Communist Party for several years before unearthing its allegedly basic purpose—the use of force and violence."

the alliance between this country and Russia in the early 1940's, by its Win-the-War program,[42] that it would have publicized to such a broad mass its objective of violence while continuing to strive for more members on its cooperative Win-the-War platform.

Indeed, the Court below itself pointed out that petitioner and many others were in the Party only as the result of ignorance and gullibility, and of being misled by the Party leaders (201 F. 2d at p. 303).

Just as it is arbitrary to assume from all past Communist Party membership regardless of its period or duration, a subscription to the aim of violent overthrow, such past membership cannot, by the same token, be taken to signify a spirit of defiance of our law (compare *Harisiades,* 342 U. S. at p. 594). No defiance can be inferred when, as was true during the period of its greatest membership, the Party appeared to be a legal political organization, cooperating with the Government; and members joined because, like petitioner, they were interested in participating in an allegedly "progressive" organization (to use the language of those times).[43] Considering the guise of the Party during the period, its deception even of the more studious as to its objective, and the spirit of the times, the alien who joined during the 1930's and the 1940's prior to the "cold war" with Russia, was much more likely to have been stimulated by a sense of his freedom, along with the citizen population, to exercise his rights of free expression and association in lawful activities,[44] than by a spirit of defiance. He was much more likely to have been stimulated by the spirit of innocent "joining" that is, or at

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[42] See Ernst and Loth, *loc. cit., supra,* note 27, and Appendix to this Brief, p. 65.

[43] See Hearings, *loc. cit., supra,* note 27.

[44] As to these rights, see *Bridges* v. *California,* 314 U. S. 252; *Bridges* v. *Wixon,* 326 U. S. 135, 148.

least used to be, "the most characteristic of American attitudes" [45] than by a spirit of revolt.

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The Congressional reasons for enacting the Internal Security Act, stated in section 2, all relate to the danger from persons at present active in and assisting the Communist movement; we do not doubt that aliens who are, in reasonable likelihood, in this class can be deemed undesirable residents and deportable as such. But the instant provision for deportation for membership at any time in the past in the Communist Party, as here interpreted, is not reasonably related to the objective of expelling those endangering our security. For we have shown that there is both a high probability that those who joined the Party, particularly during the periods of its highest membership, did not know of the objective of violent overthrow of the government, as well as a high probability that members of the Communist Party who left it at any time other than during a few crucial periods in its affairs, in fact resigned because of a "change of heart" as to its program and manifested the end of any agreement they may have had with its subversive aim. Lacking reasonable relation to the only objective of the deportation power permissible under the Constitution, the instant statute as it has been here interpreted, cannot be deemed a Constitutional exercise of that power. Rather, it must be considered a punishment inflicted on those who were ignorant or naive enough to at any time join the Party, and who lacked the prescience borne of 1953 hindsight.

B. The decisions of this Court establish that a refusal to distinguish between innocent and knowing membership is arbitrary.

This Court's decision in *Weiman* v. *Updegraff*, 344 U. S. 183, rendered since *Harisiades*, throws light on the ques-

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[45] See *Garner* v. *Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J., concurring in part).

tion of *scienter*, which was not considered in the earlier opinion. In the *Weiman* case the statute provided that past membership in certain organizations disqualified a person for Government employ; there as here the Constitution was considered to extend only the most minimal protection against the measure in issue, for the legislature has the broadest discretion with respect to employment in the Government departments, and their maintenance free from subversion.[46] Recognizing doubt even that any "right to public employment exists" this Court held only that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory" 344 U. S. at p. 192. But even under this minimal standard, the Court determined that it was unconstitutional, because "patently arbitrary," to base exclusion from public employment on past membership in an organization without considering whether the member had knowledge of its purposes. Holding the statute unconstitutional because it did not except innocent membership from the disqualification, the Court said:

> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had

[46] Indicating the breadth of discretion accorded the legislature in dealing with qualifications of public employees and their minimal Constitutional protection, is this Court's much-quoted statement in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, again quoted in *Weiman* (342 U. S. at pp. 191-192) that the only regulation as to public workers that could with certainty be deemed a Congressional abuse of discretion would be a "regulation providing that no Republican, Jew or Negro shall be appointed to federal office." Thus the concept of Congressional discretion with respect to public workers is highly similar to that with respect to deportation. Compare statement in Court of Appeals' opinion in *Harisiades* case as to "blue-eyed aliens" (187 F. 2d 137, 141).

joined (but), did not know what it was * * *'.[3] At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.

"[3] Testimony of J. Edgar Hoover, Hearings before House Committee on Un-American Activities on H. R. 1884 and H. R. 2122, 80th Cong. 1st Sess. 46." (Footnote as in court's opinion) (344 U. S. at pp. 190-191).

And in *Garner* v. *Los Angeles Board*, 341 U. S. 716, which involved a similar disqualification for public employment and a similar minimal due process protection, the Court upheld the statute only because it assumed the disqualification would not affect

> "those persons who during their affiliation with a proscribed organization were innocent of its purposes, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation. We assume that scienter is implicit in each clause of the oath." (Footnote omitted; 341 U. S. at pp. 723-721.)

And see this Court's decisions in the *Adler* and *Gerende* cases, on which it relied in *Weiman*[47]; in these cases as well, statutes establishing a disqualification for public employment or public office on the basis of organizational membership were held valid only because they were construed as disqualifying solely those members who had had knowledge of the organization's objective of violent overthrow. To date, this Court has not approved a deprivation on the basis of innocent membership.

[47] *Adler* v. *Board of Education*, 342 U. S. 485, 494-495; *Gerende* v. *Election Board*, 341 U. S. 56, 57; cited in *Weiman*, 344 U. S. at p. 189.

We submit that the instant provision which does not even allow, as did the statutes involved in the above cited cases, for a hearing as to the organization's purposes, and which imposes a harsh penalty of a much more drastic and punitive nature than disqualification for public employment, must, on the authority of these decisions, be held arbitrary and unconstitutional unless it is construed as imposing deportation only on those past members of the Communist Party who knew of its advocacy of violence (see infra, p. 42, for the argument that the statute should be so construed).

C. The statute as here interpreted is invalid because it restrains First Amendment rights without reasonable justification.

The statute as here interpreted to make petitioner and others like him deportable though they did not know or have reason to know when they joined the Communist Party that it advocated violent overthrow, imposes a drastic restraint on the exercise by resident aliens of their constitutional rights to freedom of expression and association.[48] For it is apparent that if Congress can order the expulsion of past innocent members of organizations, aliens will fear to participate in even the most innocent-appearing organization. They may, years after their innocent activity, find themselves subjected to the harshest of penalties as a result! If "it matters not whether association existed innocently or knowingly," the consequence

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[48] As to resident aliens' right of free expression, see cases cited supra note 44. And the right to join organizations is part of First Amendment freedom. *American Communications Association*, 339 U. S. at p. 400. See also *Garner*, 341 U. S. at p. 728 (Frankfurter, J., concurring in part).

We would respectfully take issue with the Court's reasoning in *Harisiades* from the *Dennis* opinion (342 U. S. at p. 592), that no First Amendment right is restrained when advocacy of violent overthrow is restrained; for the *Dennis* case appears only to deal with such advocacy when it creates a clear and present danger. However, consideration of this question is not necessary in the instant case.

is to "inhibit individual freedom of movement" and "to stifle the flow of democratic expression." *Weiman,* 344 U. S. at p. 191. As pointed out in *Garner,* such retroactive penalization of association that at the time appeared innocent "is bound to operate as a real deterrent to people contemplating even innocent associations. * * * All but the hardiest may well hesitate to join organizations * * * " (*Garner,* 341 U. S. at p. 729, Frankfurter, J., concurring in part). There, the proscription which was thought to deter all but "the hardiest" was disqualification from public employment; here, with the possibility of banishment from home, family, and means of livelihood as a result of innocent-appearing association, it would seem that no one, even the hardiest, would risk it.

Regardless of other Constitutional standards, the fact that the statute has the effect of restraining the exercise of First Amendment rights in itself requires its careful scrutiny and its invalidation unless it is reasonably necessary to security. *American Communications Association* v. *Douds,* 339 U. S. 382.[49] The restraint on the rights of free expression imposed by the deportation of innocent past members of the Communist Party under the instant statute cannot, as we have already shown, be justified as reasonably necessary to our security or indeed in any way reasonable; and the statute as here interpreted is therefore unconstitutional.

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[49] "By exerting pressures on unions to deny office to Communists and others identified therein, § 9(h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment * * * the fact that no direct punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements undoubtedly have the same coercive effect upon First Amendment rights as imprisonment, fines, injunctions, or taxes * * * the distinction is one of degree and it is for this reason that the effect of the statute in proscribing beliefs * * * must be carefully weighed. * * * We must, therefore, undertake the 'delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'" (339 U. S. at pp. 393, 402, 409, 400; by Vinson, C. J.)

D. The Statute as Here Interpreted Violates the Guarantee of Due Process Because It Operates Retrospectively and Without Fair Notice to Those Deportable Thereunder.

The fact that petitioner did not know nor have reason to know when he allegedly belonged to the Communist Party that it advocated violence or that it was considered by the courts to be an organization so advocating (see discussion of decisions, supra, pp. 17, 31-32), and the fact that such knowledge was unlikely on the part of many aliens during their membership in the Party (see pp. 29-34, supra), renders the statute as here interpreted invalid for yet another reason. For, under this interpretation a drastic penalty is inflicted on petitioner and other innocent members of which they had no warning at the time of their membership.

Despite the limited protection accorded aliens under the due process guarantee, this Court has made it clear that basic fair play is assured them.[50] A penalty imposed retroactively without warning is the most "essential injustice."[51] Accordingly, in *Bugajewitz* v. *Adams*, 228 U. S. 585, 591, this Court indicated that a retrospective provision for deportation would be unconstitutional. And more recently in *Jordan* v. *DeGeorge*, 341 U. S. 223, involving deportation on the basis of convictions of crimes involving moral turpitude, this Court recognized that the Constitutional requirement of fair notice is applicable to deportation statutes and that the alien must be "forewarned" as to the acts that would result in his deportation (341 U. S. at p. 232). The Court said:

> "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct * * *. This Court has repeatedly stated that criminal statutes which fail to

[50] See *Wong Yung Sang* v. *McGrath*, 339 U. S. 33, 49-50.

[51] See *Screws* v. *United States*, 325 U. S. 91, 101; *American Communications Association* v. *Douds*, 339 U. S. 382, 413.

> give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process * * *. Despite the fact that this is not a criminal statute, * * * in view of the grave nature of deportation * * * we shall * * * test this statute under the established criteria of the 'void for vagueness' doctrine" (341 U. S. at pp. 230-231).[52]

Mr. Justice Jackson, the only dissenter, disagreeing only as to the construction of the statute, but agreeing vigorously with the majority's doctrine, declared:

> "A resident alien is entitled to due process of law. * * * because of his (the deportee's) alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime" (341 U. S. at p. 243).

Thus, applying the "void for vagueness" doctrine in *Jordan,* this Court recognized the applicability in deportation of the basic premise that it is an "essential injustice" for the Government to inflict penalties without sufficient warning. Where as here there was no proscription of Communist Party membership as such at the time thereof, or any warning as far as innocent members were concerned that it might be in the category proscribed by law, there is an imposition of penalty with even less warning than in the case of a vague statute. Though it is true that the statutes then on the books subjected members of organizations advocating violence to deportation, this served as no notice to members who did not know of the Party's forcible purpose and who were not alerted to it

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[52] See *Harisiades,* 342 U. S. at p. 593, where the Court apparently recognized this limitation on deportation statutes. Compare *Weiman* v. *Updegraff,* 344 U. S. 183, 192, as to the necessity for notice that an organization is proscribed; also *Garner* v. *Los Angeles Board,* 341 U. S. 716, 721.

by judicial action or otherwise. For such members, there were no "facts from which common experience showed that the consequences"[53] of deportation would follow from their membership. It was not a case of "the actor [knowing] the consequence will follow and he may be liable for it even if he regrets it"[54] but of his having no reason to know a detrimental consequence would follow.

When petitioner allegedly joined the Party in 1945 or 1946, he had no reason to know or any warning that such membership could result in the harsh penalty of deportation. Three years after he had abandoned whatever membership he possessed, he is subjected by the instant statute to being cast forth from his home of 35 years' standing, for this membership. For petitioner and the large group of aliens subject to deportation under this statute who are like him, it is entirely retrospective and unfair as here interpreted, and violates the due process guarantee of the Constitution.

E. The Statute Should Be Construed as Ordering the Deportation of Past Members Only if They Knew of the Party's Advocacy of Violence.

In *Garner* (discussed supra, p. 37), a statute barring past members of organizations advocating violence from Government employment, was saved from doubt of its constitutionality by construing it to apply only to members who knew of the organization's advocacy of violence. See also *Gerende*, *Adler* and *Weiman* discussed supra.[55] We submit that the instant statute must likewise be construed

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[53] *Abrams* v. *United States*, 250 U. S. 616, 626 (Justice Holmes dissenting), cited with approval in *Dennis*, 341 U. S. at p. 515.

[54] *Ibid.*

[55] In *Gerende* and *Adler*, the statutes had been interpreted by State courts or officials as applying to knowing membership. In *Garner*, this Court relied on the assumption that such an interpretation would be made. In *Weiman*, the statute had been interpreted to the contrary and was therefore held unconstitutional.

to refer only to knowing members in order to avoid constitutional doubt. Reading the instant statute as ordering deportation only if the alien knew of the Communist Party's subversive purpose, would go far to give the statute a reasonable relation to the Constitutional purpose of the deportation power (see supra, pp. 27-34) to free it from arbitrariness (supra, pp. 35-38), to diminish its restraining effect on First Amendment rights (supra, pp. 38-40), and to cure it of the vice of retrospectivity (supra, pp. 40-42).

Further, the statute itself gives evidence that it was intended to be so read. For Section 2 of the Internal Security Act of 1950 specifies as the danger "those individuals who knowingly and wilfully participate in the world Communist movement" (Section 2(9)). Certainly Congress could not have intended to include for deportation those who were not, even in the past, wilful and knowing participants. Furthermore it is to be observed that the deportation provision includes not only members of the Communist Party, but of the Communist Political Association; in the latter case, even more than the former, it is inconceivable Congress intended that endorsement of subversive purposes be imputed, regardless of *scienter*, to all members of the organization. Finally, in discussing the intent of the legislation Senator McCarran, its sponsor, stated that Congress had intended the Act to be construed in accordance with the construction of the previous deportation acts, and quoted in particular the following language from *Colyer* v. *Skeffington*,[56] which had interpreted the original 1918 Act:

> "'Congress could not have intended to authorize the wholesale deportation of aliens * * * who are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.'" [57]

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[56] 265 Fed. 17, 72 (D. Mass.), reversed on other grounds sub. nom. *Skeffington* v. *Katzoff*, 277 Fed. 129 (C. A. 1).

[57] 97 Cong. Rec., Part 2, p. 2373 (March 14, 1951).

And it is to be noted that under the authoritative ruling on the 1940 Act, which was the amendment to the 1918 Act immediately preceding the instant statute, an alien without *scienter* was not deportable, because cooperation in the organization's unlawful purposes and thus necessarily knowledge of them, was held to be a component of "membership" or "affiliation." See *Bridges* v. *Wixon*, discussed supra, p. 20.

The Government referred in its brief in opposition to the instant petition for certiorari to the difficulties of proof unless past membership in the Communist Party were considered a conclusive cause for deportation. In all the cases involving membership in proscribed organizations (discussed supra, pp. 35-37), this Court has ruled that the statutes only covered knowing membership, and it has not been suggested nor demonstrated that efficient administration was defeated by this requirement. Certainly the security of public employment from subversion, at issue in those cases, is of equal importance with the deportation of aliens. And it would of course be fanciful to suppose that proof of knowledge would involve subjective probing of the mind; it would, as in the numerous instances throughout the law where *scienter* is required, depend on objective facts [58] of the same type that would be involved in showing membership itself. We concede that fair and rational laws may be somewhat more cumbersome than a streamlined dictatorial system; but if this were a reason to eliminate elements vital to a reasonable criterion of deportability, the statute should be reduced to some such simplified test as a provision for deportation of anyone who had been seen at a Communist sponsored meeting.

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Besides the grounds already argued for holding the statute unconstitutional as here interpreted, we submit that in that it is not a reasonable method of ridding the country

[58] See *American Communications Ass'n* v. *Douds*, 339 U. S. 383, 411.

of undesirable residents, it should be deemed a violation of the substantive guarantee of due process of law. For, while we do not doubt this Court's statement in the *Harisiades* opinion that it could not "equate our political judgment with that of Congress" (342 U. S. at p. 590), we do not believe that opinion precludes the limited judicial consideration of the reasonableness of the legislative judgment which is guaranteed by due process (see 342 U. S. at p. 591).

Though the power to deport is considered in part to be implied from sovereignty, the fact that sovereignty is the source of a power does not free it from the limitation of due process when it is used in relation to domestic problems.[59] Thus, the war power, which likewise stems in part from sovereignty, is unlimited by due process if exercised against other sovereignties and for external purposes.[60] But if exercised against residents to accomplish a purpose relating to internal affairs, the constitutional due process limitation is fully applicable.[61] In enacting the Internal Security Act, it is clear from the Act's findings and very title that Congress was not concerned with other sovereignties or with this country's external dealings. Congress obviously realized, as Mr. Justice Jackson has said, that dealing with alleged subversives in this country, whether citizen or alien, is "our problem";[62] the deportation pro-

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[59] Insofar as the power to deport aliens is implied from the power granted by the Constitution over naturalization, it stems from a power to regulate the role of aliens in domestic affairs; and it seems generally assumed that from this aspect it is no more free from the restraint of due process than other regulations of resident aliens.

[60] See *Ex Parte Quirin*, 317 U. S. 1.

[61] See *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426, 447-448; *Hirabayashi* and *Endo* cases, cited supra, p. 23.

[62] *United States* v. *Spector*, 343 U. S. 169, 180. Compare suggestion by President's Commission on Immigration and Naturalization that no alien be deported who was lawfully admitted before the age of 16 or who has been admitted for over 20 years. *Report*, cited supra note 24, at p. 202.

visions are clearly part of the regulation of this domestic problem, of concern to this country alone.

That international law does not impose a due process standard upon our power to deport is immaterial. For international law only insures those very minimal standards of treatment which have received the consent of all nations,[63] and its standards can only be advanced by the more advanced nations acting as bellwethers. By virtue of our Constitution, our Government functions under a far higher standard than that imposed by international law. Observance of due process as a limitation on its deportation power would be in no way novel; the Constitution already curtails in other respects the more despotic freedom the Government would enjoy under international law with respect to the treatment of resident aliens.[64]

III. The provision for deportation of persons who have at any time in the past been members of the Communist Party violates the constitutional guarantee of due process of law in that it substitutes legislative fiat for the hearing ensured by the guarantee.

For the first time in the history of the deportation law, it departs from the tenet that it is the legislative function to adopt policies and principles of general applicability; for the first time Congress has instead proscribed from continued residence and imposed the harsh penalty that is

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[63] See 1 *Oppenheim's International Law* (4th Ed., McNair, 1928), p. 17, *The Antelope*, 10 Wheat. 66 (by Marshall, C. J.).

[64] Many of the rights now accorded to aliens under due process and equal protection on the basis that these clauses protect all residents, are not insured to them by international law. Compare cases cited supra note 48; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239 U. S. 33, and *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410; with Fenwick, International Law (rev. ed.) 192; Borchard, Diplomatic Protection of Citizens Abroad (1915) 43.

"the equivalent of banishment or exile" [65] on members of a particular organization. Such special legislation is contrary to our fundamental concept of the legislative function and of due process of law. For "Law * * * must not be a special rule for a particular case, but * * * 'general law, a law which hears before it condemns * * *'" *Hurtado* v. *California*, 110 U. S. 516, 535. Semble: 2 Cooley, Constitutional Limitations (1927, 8th ed.) 809.

When the bill designating Harry Bridges for deportation was debated, Representative Hobbes, though favoring his deportation, opposed the bill on the ground it "frankly transgresses one of the cardinal principles which our founding fathers would have died to preserve inviolate." [66] Similarly, the then Attorney General Jackson declared that the bill "would be an historical departure from an unbroken American practice and tradition." [67] So too in 1948, testifying on a bill that was a predecessor of the Internal Security Act, the then Attorney General Clark pointed out: "singling out a political party or group for prohibitive legislation * * * may be * * * objectionable as special legislation." [68]

The vice of the instant statute is not, however, merely that the legislature has undertaken to specify the organization whose members are to be penalized. If the statute only related to present members of the Communist Party, it would more nearly resemble an adoption of policy, and thus appropriate legislative action, in that it would at least in a sense establish a rule for the present and future as to Party membership. Here, however, the Legislature has in effect made an adjudication as to the character of the Communist Party, and as to the undesirability of aliens

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[65] *Delgadillo* v. *Carmichael*, 332 U. S. 388, 389.

[66] Quoted in note, 52 (1942) Yale Law Journ. 108, 116.

[67] Sen. Rep. No. 2031, 76th Cong., 3rd Sess., p. 9.

[68] Hearings before Subcommittee on Legislation, Committee on Un-American Activities of House of Representatives (80th Cong., 2d Sess.) (Feb. 5, 1948), p. 20.

because of their Party connection, at any and all times during the past thirty-five years of its existence in this country.

By erecting a conclusive presumption as to membership in the Communist Party at all times in the past, the Act deprives the alien of his right under due process to a determination of his deportability by a fair procedure and a fair hearing. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49-50. For he gets a hearing only as to whether he was a member of the proscribed organization; he gets no hearing on the existence of the fact which is the supposed basis for inferring his undesirability: the organization's advocacy of violent overthrow during his membership.

The situation seems indistinguishable from that in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. There the Attorney General had determined, on the basis of reports and studies, but without a hearing, that various organizations could properly be deemed "communist"; in subsequent loyalty proceedings against Federal employees, while the employee would have a hearing to determine whether he was a member of these organizations, there would be no hearing as to the character of the organization, the Attorney General's determination being conclusive in this respect. Despite the minimal constitutional protection traditionally afforded Government employees as to discharge (see supra, p. 36), all the majority Justices who considered the proceedings against the employees believed that their right to a hearing would be nullified if the Attorney General's fiat were to be conclusive of the character of the organizations (341 U. S. at pp. 178, 184-185; and see p. 173). Even the dissenting Justices made it clear that they would consider the Attorney General's designation a violation of due process if membership in a "communist" organization were to be a conclusive reason for discharge (341 U. S. at pp. 205, 207, 209). Thus, it is clear that the Court as a whole would have considered the employee de-

prived of due process if the only issue on which he had a hearing was his membership in the designated organization, as under the instant deportation provision.[69]

The instant statute clearly presents an equal violation of due process to that involved in the *Joint Anti-Fascist* case; here the character of the organization is established by fiat not only for the present but for the past 35 years, and a deprivation far more serious than loss of employment,—indeed in which loss of employment is only a minor element,—is inflicted. The more serious the deprivation, the more important are the procedural safeguards. *Bridges* v. *Wixon*, 326 U. S. 135, 154.

A statute involving a similar procedural problem to the instant one was likewise presented to this Court in *United States* v. *Spector*, 343 U. S. 169. There the statute imposed a criminal penalty upon aliens against whom there were deportation orders, who did not make arrangements to depart. While the majority reserved decision on the question, it gave some indication that the alien could not be foreclosed from a determination in the appropriate tribunal of all the elements that would properly be involved in his guilt, including the validity of the deportation order (343 U. S. at pp. 172-173). Mr. Justice Jackson, dissenting, thought it clear that the statute precluded judicial trial of that issue and he therefore faced squarely the question reserved by the majority. He said:

> "If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom." 343 U. S. at pp. 177-8.

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[69] And see *Weiman* v. *Updegraff*, 344 U. S. 183, 192.

There the alien's right to a judicial trial, which he possessed because the penalty was criminal, would have been violated in that part of the determination of his guilt was relegated to an administrative determination; here the right to an administrative hearing, which he possesses because the penalty is deportation, is violated in that a vital element as to his deportability is subtracted from administrative consideration and determined by legislative fiat. And here too a broader principle than the law applicable to the deportation of aliens is involved. If, without adversary proceedings and on a mere legislative estimate of probabilities, Congress can depart from its customary policy-making role and make determinations as to particular individuals and organizations, the constitutional separation of powers and the protection of due process will be lost. If Congress can by fiat establish the facts that have traditionally been established by quasi-judicial proceedings, and that can only appropriately be so determined,[70] the major protection afforded to every person by due process, a fair and reasonable determination of the facts, will be abandoned.

Here determination by fiat is particularly obnoxious because Congress has in effect made an adjudication of facts as to the character of the Communist Party at any and all times for the past thirty-five years. Even when this Court was concerned with the determination of general social conditions for a past period, rather than the character of a particular organization, it remanded the case for the taking of evidence in the lower court; it held that though a

[70] As to the Constitutional necessity for a quasi-judicial hearing in determinations as to specific individuals or organizations, see *Interstate Commerce Commission* v. *Louisville and Nashville R.R. Co.*, 227 U. S. 88, 93-94; *Morgan* v. *United States*, 304 U. S. 1, 14, 18-19. And the hearing requirement cannot be avoided merely by making a determination of facts as to a group, preliminary to enforcement proceedings against its members. Compare *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Bowles* v. *Willingham*, 321 U. S. 503, 519-521.

"declaration * * * by the legislature so far as it relates to present facts" is entitled to "respect", when the situation at various past times is material, "the facts should be accurately ascertained and carefully weighed." *Chastleton Corp.* v. *Sinclair*, 264 U. S. 542, 549 (per Holmes, J.). "Legislative fiat" cannot here be permitted to take "the place of fact." [71]

The Government has suggested in support of the instant provision that Congressional committees in 1931 and 1935 had concluded that the Communist Party then advocated violent overthrow of the Government. It is to be noted that the findings in the instant Act only relate to the present, and the Committee conclusions mentioned by the Government would hardly account for the 35-year coverage of the instant provision.

But in any event we regard these Congressional reports as of no materiality. It is appropriate and necessary for Congress in the legislative process to base its judgment on whatever material it chooses, and it is not the province of the courts to consider the proceedings by which it arrives at its judgment. Indeed, this is one of the major distinguishing features of the legislative process. The Government's theory would mean that in place of a determination of facts by a fair judicial or quasi-judicial procedure, the legislature can ordain them conclusively, with the courts merely determining whether there were materials Congress had, or could have had, before it which support its view of the facts. Due process of law under this system would not exist whenever Congress chose to itself make the determination, on a mere estimate of the probabilities without adversary proceedings.

As to the Government's attempt to support this unprecedented type of legislation on the argument that it

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[71] *Western and Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642. Semble: *Manley* v. *Georgia*, 279 U. S. 1, 6. Compare, *Stack* v. *Boyle*, 342 U. S. 1, 6.

lessens the administrative burden, it hardly seems necessary to say that administrative convenience cannot be allowed to dilute Constitutional rights absent a showing of actual administrative impossibility and emergency [72] such as has not and cannot be made out here. And it may be noted that expedients less destructive of procedural rights than the use of legislative fiat could be adopted. See for example, the procedure specified in other sections of the Internal Security Act for administrative hearings to determine the character of organizations. (See Title I of Act.)

As Justice Frankfurter declared in concluding that the Attorney General's fiat as to "communist" organizations was violative of due process:

> "Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances." (*Joint Anti-Fascist* case, 341 U. S. at pp. 173-174).

Here as there the case has no square precedent, because Congress has never before attempted to by-pass procedural protections, and impose a penalty on membership in a designated proscribed group. As the Senate Judiciary Committee said: "This provision is new and is designed as a direct identification and proscription of such [the identified] aliens as subversive." [73] In establishing this novel proscription, we submit that Congress violated the guarantee of due process.

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[72] Compare *Hirabayashi* and *Korematsu* cases, supra, p. 23.

[73] Sen. Rep. 2230, 81st Cong., 2d Sess., p. 6; repeated in Sen. Rep. 2369, 81st Cong., 2d Sess., p. 6, accompanying S. 4037, the immediate antecedent of the Internal Security Act.

IV. The statute as here interpreted violates the constitutional prohibition of bills of attainder and ex post facto laws.

The question of whether a deportation statute is a bill of attainder has never before arisen because there has never been a statute which imposed deportation on a designated group for their past conduct. The instant statute singling out a named class of persons and imposing a penalty on them for past conduct, is typical of a bill of attainder. For it not only designates the group on whom the penalty is to fall, but, as in previous statutes held to be bills of attainder, "the basis of disqualification was past action * * * [so that] nothing that those persons proscribed by its terms could ever do would change the result." (*American Communications Assn.* v. *Douds*, 339 U. S. 382, 414).

The fact that deportation is considered a civil rather than a criminal sanction and, when legitimately imposed, is not deemed a punishment, in no way contradicts the conclusion that the instant statute is a bill of attainder. For, all the statutes which this Court has held to be bills of attainder have imposed civil sanctions (See *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Pierce* v. *Carskadon*, 16 Wall. 234; *United States* v. *Lovett*, 328 U. S. 303); nor has this Court suggested in the recent cases where it has considered the attainder question that the civil nature of the statute affected its determination (See *American Communications Assn.* v. *Douds*, loc. cit. supra; *Garner* v. *Los Angeles Board*, 341 U. S. 716, 721-722). And in all the instances of bills of attainder, the statute purported to be, like the instant one, a regulatory measure directed at remedying or preventing some current or future evil. Thus, in the classic *Cummings* case, where the statute imposed a disqualification for various occupations and offices on those who had supported the Confederacy in the Civil War, it was argued that such past con-

duct was an appropriate test of present qualification to engage in those positions and occupations in that it would avert the danger of future disloyalty to the Government (4 Wall. at p. 320; and see dissenting opinion at p. 386). The holding that the statute was a bill of attainder was based on the court's conclusion that the proscription, though alleged to be a reasonable qualification, had no real relation to fitness, and therefore, though in the guise of a qualification for the positions, must be deemed a punishment (4 Wall. at pp. 319-320). Semble: *Garland, Pierce* and *Lovett,* cited supra. Thus, in *Dent* v. *West Virginia,* 129 U. S. 114, the court explained *Cummings* and *Garland* as follows (at p. 126):

> "As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that there was no way of inflicting punishment except by depriving the parties of their offices and trusts."

See similar discussion in *Hawker* v. *New York,* 170 U. S. 189, 198.

Accordingly, in discussing this group of cases, this Court said recently:

> "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'" Garner v. Los Angeles Board, 341 U. S. 716, 722.

And the determining circumstances, under the decided cases, is whether the deprivation has a genuine relation to an alleged evil, or whether the allegation of a relationship is merely a rationalization and a gloss for what is in truth punitive.

As we demonstrated in Point II of this brief, the instant statute as it has been here interpreted is not reasonably related to the alleged evil and to the only purpose for which deportation can constitutionally be imposed: ridding the country of undesirable residents.[74] Thus, as in the previous attainder cases, the allegation that the proscription of the designated group is necessary for security must be treated as insubstantial and their deportation deemed a punishment for their past acts.

The penalty here involved is indubitably far graver than that involved in any of the previous attainder cases, for deportation is a conglomerate deprivation of the most vital privileges: of residence, family unity, livelihood; and since the statute as here interpreted imposes this penalty punitively, is must be held a bill of attainder.

Violation of Prohibition on *Ex Post Facto* Laws

Like the prohibition on bills of attainder, the related prohibition on *ex post facto* laws also applies to statutes imposing civil sanctions which are deemed, because of their lack of relationship to the evil they are alleged to remedy, to be disguised methods of punishment. See *Cummings, Garland, and Carskadon*, cited *supra*. Since the instant statute as here interpreted must be deemed punitive, and since it imposes punishment after the fact for acts that were innocent and apparently free from penalty when they were done, it is *ex post facto*.

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[74] It is interesting to note that in the *Cummings* case as here, the chief factors rendering the proscription unreasonable and punitive were its extreme retrospectivity, and its failure to distinguish between innocent and malicious activity. The Court pointed out, as to the vices of the *Cummings* proscription:

> "In the first place, it is retrospective; it embraces all the past from this day; and if taken years hence, it will also cover all the intervening period. * * * And * * * it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship" (4 Wall. at p. 318).

In the *Harisiades* opinion this Court indicated it might be appropriate to consider the *ex post facto* clause applicable to the penalty of deportation, but that it regarded the question as closed by the decisions in *Bugajewitz* v. *Adams,* 228 U. S. 585, and *Mahler* v. *Eby,* 264 U. S. 32. We submit however, that in neither case was the Court considering the possibility of a deportation statute that was unrelated to the Constitutional objective of the power and was for that reason to be deemed punitive. In each case the Court was only considering the applicability of *ex post facto* from the purely temporal standpoint: that is, in *Bugajewitz,* whether an alien could be deported on a basis that was not a cause for deportation at the time of his entry and in *Mahler,* whether conduct which was not a cause for deportation at the time thereof could be taken into account in determining an alien's undesirability for residence at the time of deportation. The Court's statements as to *ex post facto,* based on the assumption that deportation was not a punishment, were not, we believe, meant to contradict the holdings of the *Cummings* line of cases that *any* deprivation, imposed without justification could be considered punitive and *ex post facto;* indeed, in *Mahler* (264 U. S. at p. 39), the Court cites the *Hawker* case which discussed this doctrine. When it stated deportation was not a punishment, we submit the Court only had in mind legitimate uses of the deportation power.[75]

The theory that deportation statutes are in any event "exclusively civil in nature, with no criminal consequences or connotations * * * has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been

[75] Thus, in *Mahler,* the Court pointed out that Congress "was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society." (264 U. S. at p. 39). And in *Bugajewitz,* the Court justified the deportation, saying: "We must take it, at least that she [the deportee] is a prostitute now." (228 U. S. at p. 590).

added and the period within which deportation proceedings may be instituted has been extended." (*United States* v. *Spector,* 343 U. S. 169, 178, Justice Jackson dissenting.) But in any event, whether ordinarily deemed civil or criminal, we submit that the doctrine of the *Cummings* line of cases, recently reiterated in this Court's opinion in *Garner* (quoted supra p. 54), is applicable to the instant statute and that it is accordingly a violation of the *ex post facto* clause.

CONCLUSION

Though upholding the deportation statute prior to the addition thereto of the instant provision, this Court pointed out that it "stands out as an extreme application of the expulsion power" (*Harisiades,* 342 U. S. at p. 588). The instant statute, as it was here interpreted, is an even more extreme example, adding additional vices to the cumulation of those in the previous law; it "would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute" (*Stack* v. *Boyle,* 342 U. S. 1, 6), and it would have a "disastrous effect on the reputation of American justice" (*Williamson* v. *United States,* 184 F. 2d 280, 284 (C. A. 2, 1950) Justice Jackson sitting as Circuit Justice).

The decision of the Court below therefore should be reversed; the deportation order should be held void; and the statute as here interpreted held unconstitutional.

Respectfully submitted.

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APPENDIX

Originals of the following documents on file in Office of the Clerk of this Court